IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-504

NATHRA NADER AND ALBERT C. SNYDER, JR.,
Appellants,

v.

GLORIA SCHAFFER, Secretary of the State, State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT; and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

CARL R. AJELLO
Attorney General

BARNEY LAPP
Assistant Attorney General

DANIEL R. SCHAEFER
Assistant Attorney General

ROBERT T. STATCHEN
Assistant Attorney General

Counsel for the Secretary of the State, State of Connecticut

30 Trinity Street
Hartford, Connecticut 06115
Telephone: Area 203 566-2203

INDEX

TABLE OF CITATIONS

CASES: *Page*

Page

COURT RULES AND STATUTES:

LAW REVIEW ARTICLES AND OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-504

NATHRA NADER AND ALBERT C. SNYDER, JR.,
Appellants.

v.

GLORIA SCHAFFER, Secretary of the State, State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT; and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

The Appellee, Secretary of the State, State of Connecticut, respectfully moves, pursuant to Rule 16 of the Revised Rules of the Supreme Court, to dismiss the appeal and, in the alternative, to affirm the judgment below on the grounds that: (a) it does not present a substantial federal question and (b) it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is an appeal from the unanimous decision of a three-judge District Court. The Court upheld the constitutionality of the portion of the Connecticut election law, § 9-431, Conn. Gen. Stat., which requires only that an elector be an enrolled party member in order to vote in that party's primary.

An unaffiliated voter may enroll in a party and participate in a primary election as late as the third Saturday before it is held. Conn. Gen. Stat. § 9-56. A voter who is already enrolled in a party and seeks to affiliate with another party need only wait six months before voting in the other party's primary. Conn. Gen. Stat. § 9-59. Affiliating with a party requires simply that the applicant fill out a form at the local Registrar of Voters office, giving his or her name, address, party affiliation desired, present affiliations with any other party, any affiliations or requests for affiliations with other parties within the last six months, and the date of application for erasure from the other party's rolls, if applicable. Conn. Gen. Stat. § 9-56.

The District Court found that these requirements properly ensure that there is "a minimal demonstration by the voter that he has some 'commitment' to the party in whose primary he wishes to participate." Memorandum of Decision, p. 16. The Court ruled that the statute in question served completely legitimate state interests in the prevention of party "raiding" and the distortion of primary contests by those who have no interest whatsoever in the party or its principles.

The balance of the proceedings and remaining background are adequately set forth in the opinion of the three-judge District Court (Jurisdictional Statement, pp. A-2 - A-6) and need not be repeated here.

THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION AND THE QUESTIONS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

This appeal seeks to overturn one of the most elementary standards for conducting party primaries. This is the simple requirement that in order to vote in a party primary, one should be a party member. There is no question as to any unreasonable or arbitrary criteria for party affiliation, or of any suspect classification based upon wealth, race, property status or other grounds. Nor is there any issue as to restrictions on political activity or voting rights as a result of party affiliation. All that is involved is the bare claim that one who has not affiliated with a political party and has no intention of ever doing so nevertheless has an inherent, constitutional right to vote in party contests. This of course supposedly carries with it the right to influence the outcome of struggles for leadership and political position within the party. The broad assumption for this attack is that party goals and philosophies are invariably vague and meaningless (Jurisdictional Statement, p. 25); that one of the appellants in 1974 "decided that there was no significant difference between the two major parties;" that "[t]he Watergate scandals also persuaded him that the the present political system makes candidates excessively dependent on their parties and unwilling to be independent and honest;" that "he has had little real choice between candidates at the general election;" and that "the perecntage of voters who do not vote in such elections indicates that other voters share his views." (Jurisdictional Statement, p. 4).

On the basis of sentiments such as these, appellants seek to annul the statutory safeguards requiring merely that voting in party primaries be limited to enrolled party members. These statutes are supposedly prohibited by the Constitution and are absolutely beyond the legislative power of a state, so the

argument goes. This claim would in effect mandate the so-called "crossover" primary in every state in the union — with all its attendant difficulties and confusion which recent criticism has brought to light.[1] This is a demand for drastic and radical judicial surgery contrary to all established principles of justice, equity, and constitutional law. The appeal is devoid of any merit whatsoever and certainly does not justify plenary consideration by this Court. A review of the controlling decisions makes this clear.

A. POLITICAL PARTY ENROLLMENT PRIVILEGES AND *ROSARIO v. ROCKEFELLER*.

One of the leading cases on the subject of party enrollment privileges is *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). That decision dealt with the New York closed primary system. Voters desiring to affiliate with a political party had to do so thirty days prior to the November general election in order to vote in the party primaries the following year. This meant, in effect, an eight month waiting period for the June presidential primaries and an eleven month waiting period for the September non-presidential primaries. The plaintiffs claimed that because they did not register in time, they could not vote in the 1972 Democratic primaries. However, the Court noted that:

> "Although they could have registered and enrolled in a political party before the cutoff date in 1971 — October 2 — they failed to do so. . . ."
>
> 410 U.S. at 756.

Equal protection, right to vote and freedom of association allegations similar to those involved here were made in

[1] See Memorandum of Decision, Jurisdictional Statement, p. A-22, and note 8 to the Memorandum of Decision, *id.*, p. A-26, citing a number of editorials, news commentaries, and law reviews on this point.

that case. These claims were based upon decisions which had struck down statutes denying the right to vote to non-property owners, servicemen, or newly arrived residents. It is noted that similar cases have been cited by the plaintiffs in the present action. The Court, however, stated that:

> "In each of those cases, the State totally denied the electoral franchise to a particular class of residents and there was no way in which the members of that class could have made themselves eligible to vote. . . ." *Id.* at 758.
>
> "Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong — newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary. . . ."
>
> "The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.
>
> "For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in

order to participate in their chosen party's next primary. . . ."

Id. at 758-759.

The Court noted that the New York provisions did not lock in a voter to a particular party affiliation from one primary to the next. An elector could transfer so as to vote in the primaries the following year provided an application was made in time.

Looking to the purpose of the deadline provisions, the Court noted that the time period involved was:

"not an arbitrary time limit unconnected to any important state goal. The purpose of New York's delayed-enrollment scheme, we are told, is to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."

Id. at 761.

The Court quoted the ruling of the Second Circuit Court of Appeals below, recognizing that " '[T]he notion of raiding, its potential disruptive impact, and its advantages to one side' " was a proper subject of state legislation. *Id.* at 762.

The Court also stated that:

"It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal. Cf. Dunn v. Blumstein, supra, 405 U.S. at 345, 92 S.Ct. at 1004; Bullock v. Carter, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed. 2d 92 (1972) . . . ."

Id. at 762.

The Court concluded that the New York provisions involved "merely imposed a legitimate time limitation on their enrollment, which they chose to disregard." *Id.* at 763.

It is noted, furthermore, that even the dissent in that case acknowledged:

"Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. . . ."

Id. at 766.

The considerations involved in *Rosario* are of obvious importance here. In both cases we are dealing with previously unaffiliated voters. Under the Connecticut procedure, furthermore, there is a waiting period of less than twenty-one days in contrast to the eight and eleven month periods involved in *Rosario*. The plaintiffs in the present case can vote in a primary at any time provided they make the necessary application by the third Saturday before the primary. The State is not preventing them from submitting this application. Their failure to apply and to exercise the resulting enrollment privileges is an act of their own volition.

As to the minimal waiting period involved, the State has an interest in maintaining the integrity of the political process. This involves not only the prevention of intentional raiding, but also the distortion of the results of a party primary due to participation by those who are not party members.

It is also clear that we are not dealing with a waiting period that is unnecessarily restrictive as in *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). In that case the Court struck down a provision of the Illinois election code which prohibited a

person from voting in a political primary if he had voted in the primary of any other party within the preceding twenty-three months. The Court stated:

> "The effect of the Illinois statute is thus to 'lock' the voter into his pre-existing party affiliation for a substantial period of time followig participation in any primary election, and each succeeding primary vote extends this period of confinement. . . ."
>
> *Id.* at 58.

As to the raiding problem and *Rosario*, the Court stated:

> "It is also true that the Court recognized in Rosario that a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process. . . ."
>
> *Id.* at 60-61.
>
> "The New York statue at issue in Rosario did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. Under the New York law, a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election. . . ."
>
> *Id.* at 61.

As a result, even if an elector did submit a timely application he could be locked in from year to year, unlike the situation in New York and Connetcicut.[2]

---

[2] It is also noted that a statute prohibiting an elector who votes for one office in a party primary from voting in another party primary for a different office was upheld in *Green* v. *Texas*, 351 F.Supp. 143 (N.D. Texas, 1972). *See also Dickson* v. *Taylor*, 105 F.Supp. 251 W.D. Texas, 1952), appeal dismissed, 202 F.2d 4261 (5th Cir. 1953).

Other cases which have held primary restrictions invalid can be distinguished. See, e.g., *Nagler* v. *Stiles*, 343 F.Supp. 415 (D. N.J. 1972) (two year waiting period for party transfer); *Yale* v. *Curvin*, 345 F.Supp. 447 (D. R.I. 1972) (26 month waiting period); *Gordon* v. *Executive Committe of Democratic Party of Charleston*, 335 F.Supp. 166 (D. S.C., 1971) (one year waiting period, pre *Rosario*.)

The *Rosario* rationale was followed in *Storer* v. *Brown*, 415 U.S. 724 (1974). That case involved a California statutory requirement that an independent candidate not have been affiliated with a political party for at least a year before the election at stake. The Court upheld the provision, first distinguishing the situation from cases involving an outright denial of the vote:

> "It has never been suggested that the Williams-Kramer-Dunn rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. I, § 4, cl. 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. . . .
>
> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; . . ."
>
> 415 U.S. at 731.

The Court relied heavily on the *Rosario* decision and the legitimate purpose of preventing interparty raiding. In comparing *Rosario* to *Kusper*, the Court also stated:

"The Court did not retreat from Rosario or question the recognition in that case of the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding. . . ."

Id. at 732.

In upholding the California restriction, the Court recognized,

" 'the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.' "

Id. at 733.

A similar ruling was issued by the Court at the same time *Storer* was decided in *American Party of Texas* v. *White*, 415 U.S. 767 (1974). There the Court was dealing with a Texas provision which prohibited persons who had voted in recent party primaries from signing nominating petitions for new independent parties. The Court noted that the state "may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. at 782. As to the equal protection claims, the Court stated:

" 'Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.' Ferguson v. Skrupa, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963). . . ."

Id.

In upholding the validity of the restriction involved, the Court again relied upon *Rosario* stating:

"We have previously held that to protect the integrity of party primary elections, States may establish waiting

periods before voters themselves may be permitted to change their registration and participate in another party's primary. Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed 2d 1 (1973) Cf. Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973). Likewise, it seems to us that the State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process. . . ."

Id. at 786-787.

B. GENERAL STATE REGULATION AND LEGAL TREATMENT OF POLITICAL PARTIES.

In the present case we have thus far discussed the legitimate State interest in protecting the integrity of the election process. There is another consideration that is also involved, namely, the viability of the political party system. It is through this system that the policies of government are first formulated and advanced. There is a public interest in ensuring that political parties do not simply degenerate into empty labels. What we are saying is that there are associational rights of the parties themselves as well as their members which are at stake in this matter. The State has an interest in providing a certain degree of reasonable protection for those rights consistent with constitutional requirements.

The associational rights of the political parties were highlighted in *Ripon Society* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975). In that case the Court upheld a "victory bonus" delegate formula for the Republican National Convention against a one person, one vote challenge. The Court stated:

"What is important for our purposes is that a party's choice, as among various ways of governing itself, of the

one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution as much if not more than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.

"The Supreme Court has frequently stressed the close kinship of the freedoms of speech and of political association. See, e.g., *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958). It has declared that '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed. 2d 1311 (1957). It has invoked the First Amendment to strike down state restrictions on access to the general election ballot, stating that '[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.' Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 11, 21 L.Ed. 2d 24 (1968)."

Id. at pp. 585-586.

The "constitutionally protected rights of association" were also recently recognized by the U.S. Supreme Court in *Cousins* v. *Wigoda*, 419 U.S. 477 at 489 (1975).

The political party associational rights are certainly proper subjects of state regulation. In *Ray* v. *Blair*, 343 U.S. 214 (1952) the Court upheld a loyalty oath requirement for candidates for Presidential electors. The Court recognized the role of political parties in modern government, stating:

> "As is well known political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable. Compare Bryce, Modern Democracies, p. 546. . . ."

Id. at 220-221.

The Court noted that a political party had been defined as follows:

> "'A political party is a voluntary association, instituted for political purposes. It is organized for the purpose *of effectuating the will of those who constitute its members*, and it has the inherent power of determining its own policies.'"
> (Emphasis added.)

Id. at 222 n. 9.

The loyalty oath requirement, the Court stated, "protects a party from intrusion by those with adverse political principles." *Id.* at 221-222. The Court also noted that while racial requirements had been held invalid, "a state might reasonably classify voters or candidates according to party affiliations."

Id. at 226, n. 14.

The concept that the constituency of a political party is its members was also recognized in *State of Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971), cert. den.

404 U.S. 858. That case involved a challenge to the delegate composition for the Democratic National Convention. It was contended that delegates should be allocated on the basis of the entire population of a state and not party membership and strength within the state. The Court rejected this claim and upheld the delegate provisions stating:

> "The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election. For this reason it has never heretofore been thought that (with rare exceptions in one-party states) any delegate to a National Convention could fairly claim to speak for all the voters from his jurisdiction. Quite to the contrary, his constituency, if he may be said to represent a constituency, is composed only of the voters within his state who are of like political persuasion. . . ."
>
> 447 F.2d at 1279.

It is noted that the right of political association discussed in the above cases was the specific basis of upholding the Texas closed primary system in *Green* v. *State of Texas*, 351 F.Supp. 143 (N.D. Texas 1972).

> "Far from abridging federal rights, the Texas statutes here under review serve to protect the political rights of Texans to join political parties and to enjoy the free right of association appurtenant thereto with some protection against raids and interference from independents or members of other political parties."
>
> 351 F.Supp. at 145.

Finally, it is noted that the provisions of the Connecticut primary law were upheld in *Tansley* v. *Grasso*, 315 F.Supp. 513 (three-judge Court, D. Conn. 1970). The Court sustained

the requirement that certain candidates obtain 20% of the convention vote before being entitled to conduct a primary. In recognizing the broad discretion afforded states in formulating election policies, the Court noted:

> "The state does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part. . . ."
> 315 F.Supp. at 517.

The appellants' reliance upon *Elrod* v. *Burns*, —— U.S. ——, 44 L.W. 5091 (June 28, 1976) is entirely misplaced. The patronage system in that case required public employees to act contrary to their political beliefs in order to keep their jobs.

> "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. . . ."
>
> *Id.* at 5094.

In the present case, there is no coercion whatsover. An elector affiliates with a party based upon free choice. The limitation of voting in party primaries to party membership is completely justifiable in order to prevent deception and distortion, unlike the patronage system in *Elrod*. Furthermore, it is noted that the District Court, contrary to the appellants' claims, did not ignore the *Elrod* case, but expressly referred to it in the Memorandum of Decision. See Jurisdictional Statement, pp. A-9 — A-10.

If anything, this case recalls the language in *Buckley* v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976), where the Court recognized the important public interest in preventing " 'splintered parties and unrestrained factionalism.' " 96 S.Ct. at 671. The state has a legitimate concern in this regard to ensure the integrity and viability of the party system by the statutes in question.

C. SPECIAL CONSIDERATIONS OF PARTY RESPONSIBILITY AND LEGISLATIVE HISTORY.

The legitimate interests of party responsibility involved in the closed primary have been recognized in legal and political science commentaries. See, e.g., Comment, *The Right to Vote and Restrictions on Crossover Primaries*, 40 U.Chi. L.R. 636 at 659-60 (1973):

> ". . . The right of political association should require these decisions to be made by each party. The government is prohibited from impairing the organization of a group seeking to nominate a candidate. Requiring a group to open its doors to all comers dilutes the effectiveness of the group and serves the same result as prohibiting their organization in the first place. . . .
>
> "It is a perfectly tenable constitutional position to permit the states or the political parties themselves to protect party integrity by placing time restrictions on crossovers, provided the restrictions are neutral in nature and application, and, at the same time, to prohibit any other restriction on primary participation, finding no sufficient state interest to justify it."

See also Note, *Primary Elections: The Real Party In Interest*, 27 Rutgers L.R. 298 at 306, 311 (1974):

> "Since a major aspect of the primary is furtherance of associational interest, the outcome of such a partisan process should express the consensus of the party's members. Although each major party must represent a wide spectrum of political views to garner the support necessary to win elections, the party, like any other association, cannot function effectively unless there is general agreement among its constituents as to goals. . . .
>
> "Candidates nominated in partisan primaries run in the general election as the representative choice of the party. Voters may rely heavily on the party endorsement, on the assumption that the candidacy is valid and that the party is so structured as to represent fairly all its members. Where there is no adequate check on the bona fides of those exercising decision-making power within the party, this assumption may no longer be valid. Thus voters are likely to be misled by false party labels where raiding actually occurs."

See also 17 Wayne L.R. 1543 at 1564-1565 (1971); 39 Nebraska L.R. 473 at 488-490 (1960); and Note, *Judicial Control Of Actions Of Private Associations*, 76 Harv. L.R. 983 at 1008 (1963).

The history of the direct primary and the considerations involved from the political science standpoint are also discussed in V. O. Key, Jr., *Politics, Parties & Pressure Groups*, Crowell Co., (5th Ed. 1964). The author discusses the evolution of political nominating practices and the abuses involving primary "raiding" such as had occurred in Washington and Idaho. He also discusses issues of party responsibility, concluding:

"While the consensus appears to be that party would be better able to perform its role in the advancement of candidates if the open primary were abandoned, it must be conceded that systematic knowledge of the practical consequences of the open primary is limited. Yet it seems fairly clear that the open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party."

Id. at 392.

It is also noted that a report issued by the committee on political parties of the American Political Science Association, cited in *Politics, Parties & Pressure Groups, supra,* similarly states:

> "The question of open versus closed primaries needs to be reconsidered from the angle of strengthening rather than weakening party cohesion and responsibility.
>
> "*The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.* However imperfectly the idea may have worked out in some instances, it tends to support the concept of the party as an association of like-minded people. On the other hand, *the open primary tends to destroy the concept of membership as the basis of party organization.*"
>
> *Toward A More Responsible Two-Party System,* published as a supplement to the *American Political Science Review,* Sept. 1950, at 71.
>
> (Emphasis contained in the article quoted.)

It is also of interest that the Connecticut primary system which has been termed a challenge primary was intended to provide the rank and file membership with greater participation than before while still preserving a responsible party system. See Dunae Lockard, "Connecticut Tries Its New Primary", 45 *National Municipal Review,* 494 (1956); Duane Lockard, *Connecticut's Challenge Primary: A Study in Legislative Politics* (Holt, 1959 at 3). It is noted that Professor Lockard served as Chairman of the State Senate Elections Committee in 1955 at the time the Bill was written. The 20% requirement and the use of the primary as a challenge method indicated that considerations of party stability as well as membership rights were taken into account.

It is also significant that the Connecticut system is known as a challenge primary. It affords party members an opportunity to contest the candidate who have already been endorsed. Challengers must first obtain 20% of the convention vote or a designated number of petition signatures by party members, depending upon the type of nomination, in order to qualify for a primary. It would certainly be incongruous to engraft judicially upon this challenge system a "primary" whereby those outside the party with no commitment to it at all could nevertheless determine the outcome.

The point, of course, is not that any one primary system is to be preferred over all others. Instead, the considerations involved clearly demonstrate that the primary law provisions involved in this case are fully supported by legitimate State interests.

D. JUSTICIABILITY AND OTHER ISSUES.

There is a serious question as to whether the present controversy is justiciable due to "a lack of judicially discoverable and manageable standards resolving it" as well as other

grounds. See *Baker* v. *Carr*, 369 U.S. 186 at 217 (1962). There are a number of other primary systems in addition to Connecticut's that exist:

1. The so-called crossover primary whereby a voter may vote in any political primary regardless of his past affiliation.

2. The blanket primary whereby a voter can participate in the primaries of both parties but for different offices. For example, he may vote for a Democratic candidate for Governor and a Republican one for United States Senator.

3. The so-called multiple vote primary whereby an elector can vote for a nominee from each party and for each office.

> See 40 U. of Chi. L.R. 636 at 649-50, *supra*, and *Politics, Parties & Pressure Groups, supra*, at 389-390.

Which system is this Court supposed to mandate?

The United States Supreme Court has recently stressed the importance of exercising judicial restraint when the freedom of adherence to a political party is involved. See *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), *supra*. Furthermore, in *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972) the Court rejected a challenge to the 1972 Democratic National Convention, stating:

> ". . . no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Cf. *Luther* v. *Borden*, 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. . . ."
>
> *Id.* at 4.

It is also noted that the *O'Brien* Court distinguished its situation from that involving racial discrimination which triggers high standards of judicial scrutiny. 409 U.S. at 4, N. 1. See also *Armstrong, et al* v. *Schaffer, et al*, Civ. No. H 76-136, "Ruling On Motion For Preliminary Injunction" filed May 3, 1976; Comment, *Judicial Intervention In Political Party Disputes: The Political Thicket Reconsidered*, 22 U.C.L.A. L.R. 622 (1975).

In *Gaffney* v. *Cummings*, 412 U.S. 735, at 749-751, 754 (1973), the Court upheld the Connecticut reapportionment plan. It noted that it was dealing with "fundamental 'choices about the nature of representation'" which were primarily a political and legislative process. The Court admonished that the judiciary should not become ensnared in another "political thicket". *Id.* at 750. The Court noted that politics and political considerations were inseparable in reapportionment.

These considerations are especially germane here because we are dealing not with a general election as in *Cummings*, but with the internal decision making process of a political party.

E. DECISION OF THE THREE-JUDGE COURT.

In light of the above considerations, the District Court's unanimous decision was more than well founded. It would be appropriate to focus on the highlights of the opinion.

> "In addition to protecting the associational rights of party members, a state has a more general, but equally legiti-

mate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Storer* v. *Brown*, 415 U.S. 724 (1974); and *American Party of Texas* v. *White*, 415 U.S. 767 (1974). . . .

• • •

"As we have noted, the phrase "preservation of the integrity of the electoral process" contemplates, in the nominating context, the assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party. The phrase contemplates the prevention of fraud in the nominating process, and a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy. See *Rosario* v. *Rockefeller*, 458 F.2d 649, 652 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

"It is clear from these cases that, in order to protect party members from "intrusion by those with adverse political principles," and to preserve the integrity of the electoral

process, a state legitimately may condition one's participation in a party's *nominating* process on some showing of loyalty to that party, and that is precisely what Connecticut does in § 9-431. The enrollment process of § 9-56 is not particularly burdensome, and it is a minimal demonstration by the voter that he has some "commitment" to the party in whose primary he wishes to participate. It does not constitute anything in the nature of an absolute barrier to voting in a primary election because it is beyond the capabilities or powers of an elector to perform as was the case in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement), and *Smith* v. *Allwright*, 321 U.S. 649 (1944) (blacks barred from participation in primary elections). Compare *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). And if plaintiffs choose not to associate, by not enrolling in a party, their right to vote in the *general* election is unaffected. Cf. *Ripon Society* v. *National Republican Party*, *supra*, at 586, 588-89."

Jurisdictional Statement pp. A-12, A-15 — A-16.

CONCLUSION

As Mr. Justice Holmes stated in his now vindicated dissent in *Lochner* v. *People of the State of New York*, 198 U.S. 45 (1905):

> "[A constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

198 U.S. at 76.

The appeal wholly disregards these principles. It seeks to cut out from the political process one of the most basic protections for making the party system work as it should. Furthermore it attempts to do so by a strong arm attack via court orders, rather than an appeal to the legislative branch of government. Merely to state the issues thus raised is to answer them. It is respectfully submitted that the appeal be dismissed, or, in the alternative, that the judgment be affirmed, pursuant to Rule 16 of the Revised Rules of the Supreme Court.

Respectfully submitted,

CARL R. AJELLO
Attorney General

By: BARNEY LAPP
Assistant Attorney General

DANIEL R. SCHAEFER
Assistant Attorney General

ROBERT T. STATCHEN
Assistant Attorney General

Attorneys for Appellee,
GLORIA SCHAFFER,
Secretary of the State,
State of Connecticut

30 Trinity Street
Hartford, Connecticut 06115

Telephone: Area 203 566-2203

CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Appellee Gloria Schaffer, Secretary of the State, State of Connecticut, certify that on the 12th day of November, 1976, I served a copy of the foregoing Motion by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

William Clendenen, Esq.
152 Temple Street
New Haven, Connecticut 06510

Linda D. Donaldson
Alan B. Morrison
Attorneys at Law
Suite 700, 2000 P. Street, N.W.
Washington, D.C. 20036

Gilbert Lebovitz, Esq.
37 Lewis Street
Hartford, Connecticut 06103

James A. Wade, Esq.
799 Main Street
Hartford, Connecticut 06103

Carl Cella, Esq.
1 Broadway
North Haven, Connecticut 06473

BARNEY LAPP
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Telephone: Area 203 566-2203